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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1948

No. 137

BLOOMFIELD RANCH, by JAMES A. CLAYTON & CO., a corporation, managing partner, operator and co-owner thereof, and by FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRANCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW R. PATRICK, deceased, by SIGURD C. P. CORNETT, as executor of the will of Andrew R. Patrick, deceased, SAN JOSE HARDWARE CO., a corporation, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, and ESTATE OF ELLEN WEINSTEIN, deceased, by WELLS FARGO BANK & UNION TRUST CO., executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit,
AND
BRIEF IN SUPPORT THEREOF.

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Bloomfield Ranch, by James A. Clayton & Co., a corporation, managing partner, operator and co-owner thereof, and by Florence G. Baldwin, John Derrol Chace, Willis Sherman Clayton, Jr., Arthur D. Curtner, John Kirk Dorrance, Rose L. Fitch, Margaret F. Coykendall, Hugh S. Hersman, Alfred A. Hapgood, George H. Osen, Alfred L. Parkinson, Estate of Andrew R. Patrick, deceased, by Sigurd C. P. Cornett, as executor of the will of Andrew R. Patrick, deceased, San Jose Hardware Co., a corporation, Nellie Shillingsburg, Anne Thompson, Sarah Shillingsburg Barry, Margaret Leaman, and Estate of Ellen Weinstein, deceased, by Wells Fargo Bank & Union Trust Co., executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch,

Petitioners,

vs.

Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Supreme Court of the United States:

The petitioners above named, who shall hereafter be designated as Bloomfield investors, respectfully pray that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit to review the decision by that Court entered April 20, 1948, affirming a decision of the Tax Court of the United States, holding that there are deficiencies in income tax and declared value excess profits tax for the year 1940 on findings that the Bloomfield investors are an association taxable as a corporation.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

1. In affirming the decision of the Tax Court the Circuit Court of Appeals of the Ninth Circuit determined that the Bloomfield investors were not a code partnership as defined by Internal Revenue Code section 3797 (a)(2) and in so doing applied as the determinative test lack of intentional combination and joint endeavor; a test which, we submit, is not recognized by but is contrary to applicable statutes, regulations and decisions of the Supreme Court and of the courts of other circuits, which indicated that the test is whether the parties involved are engaged (1) in carrying on a business and, if so, (2) whether they are doing it in the form and manner of a corporation.

In short, the Circuit Court of Appeals has applied the common law test of a partnership, has ignored the radical 1932 amendment by which Congress substituted its own concept of partnership and discarded common law tests, and has held, in effect, that because Bloomfield investors were not a common law partnership they were an association taxable as a corporation. Lack or existence of intentional combination and joint endeavor is not a test of *distinction between* code partnerships and code associations taxable as corporations because code associations taxable as corporations as well as code partnerships may lack such *intentional* joint activity. This is a matter of general importance in tax law because of the widespread use of syndicates of this kind.

2. Fourteen investors (Clayton & Co. being one) signed separate agreements with Clayton & Co., but not with one another, by which each paid $50,000 to Clayton & Co. said sum, together with other sums to be contributed by thirteen other investors to be used by the Operator in the purchase of certain lands in California, title to be taken (and it was so taken) in the name of M. E. Thomas for the profitable resale thereof by Clayton & Co. designated as "Operator". Notwithstanding that Thomas held the title as a naked trust, and Clayton & Co. held no title as Operator though empowered to act for the investors in the purchase of the property and resale thereof the Circuit Court of Appeals decided that the Operator was not an agent of the respective individual investors and that the investors did not hold undivided (equitable)

interests in the property but that their interests were only personal claims against the Operator and were limited to the right to receive the net *profits* to be derived from the operation. The Circuit Court of Appeals failed to state where the equitable title did repose if not in the investors or in what capacity the Operator acted if not as an agent. This point goes to the merits of the decision because if title to the property of the syndicate remained in the investors and they were acting by a common agent there was a lack of semblance to a corporation in that respect since the members of a corporation hold no title to the corporate property and the corporation is not their agent. Under the law of California, which must govern this question of title to land, the several investors by operation of law acquired undivided interests in the realty when purchased with their money by Clayton & Co. Thus the Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable state decisions.

3. The Bureau of Internal Revenue for fourteen years, with complete knowledge of the facts, and in good faith on both sides, accepted returns from the Bloomfield investors as a partnership and the investors individually paid their taxes as such partners. Then in 1943 when auditing the 1940 partnership return the Bureau changed its mind upon the same facts and determined that from the beginning of the venture in 1926 the investors should have filed returns and paid taxes as an association taxable as a corporation. The Commissioner should be bound by long official and

authorized interpretation of the character of the syndicate so that (even if his later view be deemed correct) he may not now treat the syndicate as a code corporation, assess a corporate income tax and excess profits tax, for 1940, exact interest, and impose penalties for having failed to file returns as a corporation; and do the same for subsequent years; the statute barring his so doing for years previous to 1940. This is a case of established and authorized administrative application of the statute to a particular transaction. Whether the Commissioner in such circumstances is not governed by the ordinary principles of fair dealing is an important question of federal law which has not been but should be settled by the Supreme Court. Honest taxpayers, entering upon a business venture, should have some protection against such *ex post facto* changes of the Commissioner's mind and against so being penalized for lack of clairvoyance.

II.

STATEMENT OF PROCEEDINGS IN THE COURTS BELOW AND PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

On May 22, 1944, petitioners filed a petition (Docket No. 5007) with the Tax Court of the United States seeking a determination that no deficiency is due from petitioners in the calendar year 1940. At the trial there was no dispute respecting matters of fact. On January 31, 1947, the Tax Court entered its decision

that there are deficiencies in income and declared excess profits tax for the year 1940 in the respective amounts of $6646.60 and $4159.58. The decision and memorandum findings of fact and opinion of the Tax Court are reported in 6 T.C.M. 84. (C.C.H. Dec. 15,598(M).) On April 21, 1947, the petitioners filed in the Circuit Court of Appeals for the Ninth Circuit their petition for a review of that decision of the Tax Court. On April 20, 1948, the Circuit Court of Appeals entered its decision affirming the decision of the Tax Court. That decision and the Court's opinion are reported in 167 Fed. (2d) 586. On May 20, 1948, petitioners filed in the Circuit Court of Appeals a petition for a rehearing and on May 24, 1948, the petition for a rehearing was denied. The sole question involved was whether on the facts, concerning which there is no dispute, the petitioners whose partnership returns had been accepted for fourteen years, all facts being known to the revenue agents, were a code partnership whose gains were taxable to the individual investors or were a code association doing business in the form and manner of a corporation and taxable as such.

The jurisdiction of the Supreme Court is invoked under section 347 of the Judicial Code this being an application for certiorari to a Circuit Court of Appeals.

The case turns on the construction by a judgment of the Circuit Court of Appeals of the Ninth Circuit of a federal statute, namely, section 3797 of the Internal Revenue Code, particularly subdivision (2) thereof,

defining "partnership", and subdivision (3) defining "corporation", or at least saying what that word includes. For the reasons stated in the foregoing section I of this petition the case comes within several provisions of paragraph 5(b) of Rule 38 because the Circuit Court of Appeals of the Ninth Circuit has decided a federal question in a way probably in conflict with applicable decisions of the Supreme Court and of the Circuit Courts of Appeals in other circuits; has decided an important question of local, that is California, law in a way probably in conflict with applicable local state decisions; and has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

Among such applicable decisions of the Supreme Court and of Circuit Courts of Appeals of other circuits are:

> *Morrissey v. Commissioner,* 296 U. S. 344;
> *Lewis & Co. v. Commissioner,* 301 U. S. 385;
> *Commissioner v. Rector & Davidson* (C.C.A. 5), 111 Fed. (2d) 332;
> *Burnet v. Burns* (C.C.A. 8), 63 Fed. (2d) 313;
> *Commissioner v. Whitcomb* (C.C.A. 5), 95 Fed. (2d) 596.

The local statute and decisions with which this decision of the Circuit Court of Appeals is probably in conflict are:

The Civil Code of California, Section 853, which says:

> "When a transfer of real property is made to one person, and the consideration therefor is paid

by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

Estate of Harris, 9 Cal. (2d) 649 at page 660, 72 Pac. (2d) 873, at page 879, Col. 1,

where it is said:

"It is elementary, however, that if the consideration for the purchase of any property is furnished by a stranger to the title, the holder of the title, by operation of law, holds the title in trust for the one who furnished the consideration."

Also:

Harris v. Cassells, 202 Cal. 648, 262 Pac. 319;
Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579;
Case v. Codding, 38 Cal. 191;
Currey v. Allen, 34 Cal. 254.

III.

THE QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Is the presence or lack of intentional combination and joint endeavor a test of *distinction between* a "partnership" and a "corporation" as those terms have been defined since 1932 in Internal Revenue Code section 3797(a)(2) and (3)? Those definitions are:

"(2) *Partnership and partner*. The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business,

financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization.

"(3) *Corporation.* The term 'corporation' includes associations, joint-stock companies, and insurance companies."

Such forms of organization as are listed in section 3797(a)(2) are in common use and the injection of a new determinative test of a code partnership is a matter of general concern and importance in tax law.

2. If a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, is not an intentional combination and joint endeavor but has "merely the appearance of combination or collective action by accident", (a phrase from the opinion of the Circuit Court of Appeals), is it *for that reason* an association doing business as a corporation and taxable as such? Could it not be merely a group of individuals acting by a common agent; which would come under the code definition though not under the common law definition of a partnership?

3. Is not some measure of common or joint action required by definition in the concept of both a code partnership and a code association taxable as a corporation as expressed in section 3797 of the Internal Revenue Code since, as the Supreme Court in the *Morrissey* case said of a code association taxable as

a corporation, an association has been defined "to imply associates and entering into a joint enterprise"?

4. Does not the use of "intentional" by the Circuit Court of Appeals as a basis of distinction between the combination and joint endeavor of a code partnership and the combination and joint endeavor of a code corporation constitute a distinction without a difference, since in either case, the parties must be deemed to have intended what they agreed to do or did?

5. If the money of fourteen individuals having an agent in common is invested in the purchase of land in California and title is taken in the name of a trustee, who contributed nothing to the purchase price and has no powers except to make conveyances when told to do so by the agent, does not each of the respective investors own an equitable interest in the land under the California law controlling that question here?

6. Although ordinarily and as a general precept the government is not estopped by conduct or representations of its agents, nevertheless, in matters of income tax, in which the Commissioner of Internal Revenue may bind the government by agreements and waivers in particular transactions, is not the Commissioner estopped from taxing a group or syndicate as a corporation if, by accepting their returns as a partnership for fourteen years, with full knowledge of all the facts, and thus establishing administrative construction of the transaction, the Bureau of In-

ternal Revenue has encouraged the members to report their gains in their individual income tax returns, and to pay taxes thereon, which can not now be refunded, and has thus induced the syndicate to conduct its affairs on a partnership basis, presumably without building up reserves for corporate income and excess profits taxes, and interest thereon, and penalties?

7. According to tests set out in *Morrissey v. Commissioner,* 296 U. S. 344, and *Lewis & Co. v. Commissioner,* 301 U. S. 385, was not the Bloomfield syndicate a code partnership within the pattern of such cases as *Gerstle v. Commissioner,* 95 Fed. (2d) 587; *Commissioner v. Rector & Davidson* (C.C.A. 5), 111 Fed. (2d) 332; *C. A. Everts et al. v. Commissioner,* 38 B.T.A. 1039; *C. H. Clovis,* 32 B.T.A. 646; and *Stantex Petroleum Co., Trustee,* 38 B.T.A. 269?

8. Did not the Circuit Court of Appeals err in deciding the foregoing questions as it did, and in relying as it did solely on the decision in *Commissioner v. Tower,* 327 U. S. 280, 286, as an authority defining a code partnership? In the *Tower* case the Supreme Court dealt only with the question whether Tower and his wife were *common law* partners or whether Tower as an *individual* was the owner and operator of the business, and the definition of partnership quoted from the *Tower* case in the opinion of the Circuit Court of Appeals in the *Bloomfield* case was, and was intended by the Supreme Court to be, a definition of a common law partnership, and nothing more, and is certainly not an authority for the doctrine that the element of collective or conjunctive

action, intentional or otherwise, is a test for distinguishing between a code partnership and a code association taxable as a partnership.

IV.

REASONS FOR GRANTING THE WRIT.

The foregoing questions are substantial on the grounds that (a) the Circuit Court of Appeals of the Ninth Circuit in its decision has prescribed a determinative test of code partnership in conflict with the test established by Section 3797(b) and by the decisions cited above of the Supreme Court and the Circuit Courts of Appeals in other circuits and thus has raised a question of general importance in tax law; (b) has decided a question of California law in a way in conflict with an applicable California statute and applicable California decisions; and (c) has in effect decided that the Comissioner cannot be estopped by his previous long-continued administrative construction of the character of a particular syndicate as a partnership, though by accepting his construction the members of the syndicate will have suffered a considerable disadvantage if now called on to pay taxes, interest, and penalties as a corporation for 1940 and subsequent years. This is an important question of federal law which has not been, but should be, settled by direct decision of the Supreme Court.

The carrying on of a venture or a business through the form of a joint venture, group, pool or syndicate

is common throughout the United States in real estate, oil, and stock transactions. One of the petitioners herein has been handling real estate transactions in this manner since 1911. (R. 160.) An examination of the reports since the time of the *Morrissey* case shows over fifty reported tax cases on this one question alone and many of those cases would have been decided the other way if the test of the Circuit Court in this *Bloomfield* case had been applied. For example (and we cite but a few of those cases):

Pierre S. DuPont, 37 B.T.A. 1198, 1279 et seq., where various individuals contributed to a syndicate to deal in the stock of one corporation. Here there seems to be no "intentional combination or joint endeavor" yet the syndicate was held not to be an association.

Stantex Petroleum Company, 38 B.T.A. 269.

A corporation owner of an oil and gas lease sold undivided interests in the lease to thirty individuals. By the terms of the assignment the company was to drill two wells, operate them, save and pay over to the assignee their respective portions of oil and gas produced. This venture was held not taxable as an association yet there was present no "intentional combination or joint endeavor".

Commissioner v. Rector & Davidson, 111 F. (2d) 332.

Four owners of a mineral lease assigned title to two of them to facilitate management and operation. To obtain money with which to develop the lease they

sold seventy-two fractional parts to various people. Each transfer was by assignment which designated the two operators agent and attorney for each assignee respectively. This venture was held taxable as a partnership and not as an association. Here there was no "intentional combination or joint endeavor".

CONCLUSION.

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
June 24, 1948.

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Bloomfield Ranch, by James A. Clayton & Co., a corporation, managing partner, operator and co-owner thereof, and by Florence G. Baldwin, John Derrol Chace, Willis Sherman Clayton, Jr., Arthur D. Curtner, John Kirk Dorrance, Rose L. Fitch, Margaret F. Coykendall, Hugh S. Hersman, Alfred A. Hapgood, George H. Osen, Alfred L. Parkinson, Estate of Andrew R. Patrick, deceased, by Sigurd C. P. Cornett, as executor of the will of Andrew R. Patrick, deceased, San Jose Hardware Co., a corporation, Nellie Shillingsburg, Anne Thompson, Sarah Shillingsburg Barry, Margaret Leaman, and Estate of Ellen Weinstein, deceased, by Wells Fargo Bank & Union Trust Co., executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch,

Petitioners,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

1. The opinion of the Circuit Court of Appeals of the Ninth Circuit affirming the decision of the

Tax Court of the United States is reported in 167 Fed. (2d) 586.

The memorandum opinion of the Tax Court of the United States from which an appeal was taken is reported in 6 T.C.M. 84; C.C.H Dec. 15, 598 (M).

2. A concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked has been made in the foregoing petition and need not be repeated here.

CONCISE STATEMENT OF THE CASE.

There is no dispute about the facts. The only oral evidence at the trial was the testimony of Mr. Frazier O. Reed, president of Clayton & Co. The only other evidence consisted of stipulations, tabulations, and other documents, all (except the return for 1940) supplied by the Petitioners.

Clayton and each investor, including Clayton & Co. as investor, separately signed agreements each dated March 10, 1946. The fourteen respective agreements were identical in form except for the names of the respective investors. (R. 53.)

As the decision of the Circuit Court of Appeals rests for the most part on the form of the agreement between the respective investors and James A. Clayton & Co., a real estate agent and broker in San Jose, California (R. 203, 204), we set it forth in full in the appendix.

The Tax Court made findings in part as follows:

On March 10, 1926, Clayton Company paid Miller & Lux $1,235,000 for the several parcels of land, which were known as "Bloomfield" and which are referred to hereinafter as Bloomfield, for convenience. Clayton Company borrowed $585,000, which with the $700,000 of the investors made up $1,285,000, the purchase price plus the Operator's $50,000 commission. Titles were taken in the name of M. E. Thomas, an employee of Clayton Company; notes were signed by her; and deeds of trust were given to two concerns which loaned the borrowed money. (R. 216.)

When the lands were acquired from Miller & Lux, there were leases existing which had been made by Miller & Lux, and the land was taken over subject to the leases. They yielded rents of $34,041 in 1926. (R. 216.)

During a five-year period, 1926 to 1930, inclusive, 90 per cent of the property, about 24,828 acres, was sold for the total sum of $1,452,326. The loans from Miller & Lux and the bank were paid by the end of 1927. At the end of 1930, there remained 2,672 acres, unsold. (R. 216-217.)

The depression following the "crash" of October, 1929, depressed the real estate market, generally, and the sales of the property in question fell off after 1930. During ten years, from 1930 to 1940, inclusive, the only sales were sales of 60 acres for rights of way for public services, and but for such sales, no sales would have been made in 1935, 1938, 1939, 1940 and 1942. (R. 217.)

The 42 acres in the town of Gilroy were sold in parcels making up a city block. There was never any intention of subdividing this acreage into lots, and the Operator [Clayton] refused to sell land in units of less than one block. (R. 217.)

From the beginning, in 1926, Clayton Company adopted a policy of renting parcels of the acreage under leases to run for one year, subject to renewal for another year; and of keeping some of the acreage under cultivation in wheat or barley, until parcels were sold. When lands were sold, tenants were moved to other locations. The reasons for renting and cultivating the acreage. pending sales, were twofold: To carry the taxes on the property and to keep the property from going "native," i. e. becoming overgrown with weeds and brush. The Operator paid himself a commission for renting lands. Income from farming and renting was accounted for separately on tax returns. Farming operations were carried on at a loss except in 1930, 1931, and 1934. (R. 217, 218.)

From 1926 through 1940, the operations of Clayton Company consisted of farming, renting, and selling property; collecting rents and payments of principal and interest on installment sales; paying taxes; disposing of produce raised on farm; and, in general, taking care of the financial and accounting aspects of the venture. (R. 218.)

During the 15-year period, 1926 through 1940, receipts of interest totalled $156,402.85; profits from

sales totalled $311,766.93; gross receipts from rents totalled $456,062.91; and miscellaneous receipts totalled $19,533.97. The total of taxes for the same period was $224,722.76. (R. 218.)

Sales to and including 1940 totalled $1,474,243.06. Sales during 1941 to 1944, inclusive, totalled $352,600. The total gain over the cost of the properties, $1,285,000, aggregates $541,843.06. (R. 218.)

Distributions totalling $98,250 have been made to each holder of the fourteen units, totalling $1,375,500, which represents return of the original $700,000 capital plus profits from all operations. (R. 218.)

When all the acreage was purchased in 1926, Miller & Lux had put in nine wells and nine pumping units for pumping water. After 1931, when Clayton & Co. and some tenants, turned to truck farming, wet farming; and when dry years reduced the level of water in the ground, Clayton & Co. put in some wells and pumps, and made some repairs to existing wells and pumps, at a total cost of $37,903, of which sum $8,267 was spent on the Miller & Lux wells and pumps. (R. 218, 219.)

There have not been any exchanges of the Bloomfield property, nor reinvestments in other property. (R. 219.)

Frazier O. Reed, president of Clayton Company, managed the operations. He discussed progress with the investors when he saw them, individually. He called them all together to meet on three occasions to discuss income tax problems. (R. 219.)

There were originally fourteen investors and each had a one-fourteenth interest in the venture. Since 1926, changes have occurred in the investors' interests due to deaths, transfers, and sales of all or part of a one-fourteenth interest, so that there are now nineteen investors holding the original fourteen interests, some holding less than a one-fourteenth interest, and some holding a complete one-fourteenth interest plus part of another one-fourteenth interest. (R. 219.) So far the findings.

Mr. Reed testified at the trial (R. 119):

> "In 1926, as I told you, we sent Mr. Curry to San Francisco for the purpose of ascertaining how the Bloomfield Syndicate should file its income tax return. He ascertained, and we filed that way until 1930. In 1930 the matter was reviewed, and the percentage of cost, and the percentage of profit was determined, and after that we went forward without any interruption from the Department or any other source, and the income tax matters were left entirely to Mrs. Curry, who succeeded to her husband's business when he passed away."

The Tax Court made no finding on the subject of estoppel and neither the Tax Court nor the Circuit Court of Appeals discussed that point in its respective opinion.

ASSIGNMENT OF ERRORS AND SPECIFICATION OF SUCH AS ARE INTENDED TO BE URGED.

We assign the following errors of the Circuit Court of Appeals and intend to urge each of them.

1. The Court erred in adopting as a test of distinction between a partnership and an association taxable as a corporation as defined in section 3937 of the Internal Revenue Code the presence or absence of intentional combination and joint endeavor and thus decided an important question of federal law in a way which conflicts with the decisions of the Supreme Court and of the circuit courts of other circuits.

2. The Court erred in applying as a test of a code partnership the test of a common law partnership as stated in *Commissioner v. Tower,* 327 U. S. 280 at 286, and thus decided an important question of federal law in a way which conflicts with the decisions of the Supreme Court and of the circuit courts of other circuits.

3. The Court erred in holding in effect that when fourteen investors contributed money for the purchase of certain land for profitable resale, and for convenience had the title transferred to a stranger, who contributed nothing, the investors had no interest in the land, and in failing to find that in such situation the investors had undivided equitable interests in the land under the California statute and decisions governing this question of title, and thus decided an important question of local law in a way in conflict with a local statute and local decisions.

4. The Court erred in failing to find that since the Commissioner of Internal Revenue by his agents had accepted income tax returns for fourteen years from the Bloomfield investors as a partnership, with full knowledge of the facts, all parties acting in good faith, and has accepted from the investors the taxes on their respective shares of the income from the investment, he has established an administrative construction of the transaction, and is now estopped from holding the investors to be and to have been from the beginning an association, taxable as a corporation, and requiring them to pay corporation income and excess profits taxes, and interest thereon, and penalties for the period not barred by the statute of limitations: and in so failing decided by implication an important question of federal law which has not been but should be settled by the Supreme Court.

5. The Court erred in holding that the petitioners herein were an association taxable as a corporation under section 3937; the holding having been based on errors assigned above.

ARGUMENT.

I. THE COURT'S CONCEPT OF A "PARTNERSHIP" DIFFERS FROM THAT OF THE INTERNAL REVENUE CODE AND REGULATIONS.

After reciting facts that it deemed significant, the Circuit Court of Appeals said: "Since the Tax Court failed to find there was joint activity, we take this fact, to be true."

The Court then said (emphasis supplied):

"However, we do not see how this contention strengthens petitioners' case. Rather, we believe that if such a finding had been made, it would have been an element necessary to consider in establishing the position contended for by them.

"Although the cases on this subject present a very vexatious problem, not easily resolved, and such confusing language has been used in pronouncing the criteria to be followed in deciding them, we do not think that the federal courts in decisions involving the identity of an organization as a partnership under the Internal Revenue Code have willfully ignored or denied the *basic concepts of a partnership under general principles of law.*

"Just as an 'association' has been defined to 'imply associates and entering into a joint enterprise', so does a partnership or joint venture imply an association and entering into a joint enterprise. But the latter association conceives the *intentional* combination and joint endeavor of the parties interested in a common enterprise for their mutual benefit, and not merely the appearance of combination or collective action by accident. A single or isolated and non-continuing undertaking usually constitutes the distinguishing feature between a joint venture and a partnership, but the element of collective and conjunctive action for the mutual benefit of all engaged therein is necessary in both."

In support of this statement the Court cites *Commissioner v. Tower,* 327 U. S. 280, 286, and quotes this language from that case:

" 'A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses.' "

In the *Tower* case the Court was concerned with the question whether there was a *common law* partnership and the language quoted in the opinion of the Circuit Court of Appeals is intended only to describe a common law partnership.

Having held that because there was no "joint activity" in the Bloomfield case there was no partnership the Court thereupon held that it was an "association" taxable as a corporation. Yet the Court quotes the language of *Morrissey v. Commissioner*, 296 U. S. 344, where, speaking of a code association ("the statutory concept of 'association' "), the Court said that it has been defined "to imply associates and entering into a joint enterprise".

In short the ground on which the Circuit Court of Appeals bases its holding that the Bloomfield investors did not constitute a partnership forbids the conclusion that they were a code association or corporation, and indicates a conclusion that they were merely a group of individuals acting through a common agent, which is precisely what the Bloomfield investors say they are. Such a group is within the *code definition* of partnership, but not within the code definition of a corporation or association doing business in the way of a corporation. As Regulations,

section 19.3797-1 says (see appendix) "the term 'partnership' is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called partnerships. As Regulations, section 19.3797-4 (see appendix) says, "The Internal Revenue Code provides its own concept of a partnership".

The Court, it seems to us, has not given sufficient heed to the difference between the definition of a partnership recognized prior to the change made by the 1932 Revenue Act and the changed definition which provided its own concept of partnership and discarded common law tests. Prior to the 1932 Act the term "partnership" was held to mean a partnership under general law. As a result, syndicates, groups, pools, joint ventures and similar organizations were not required to file income tax returns. The 1932 Act included these organizations within the meaning of partnership. In pointing out the confusion which theretofore existed with respect to such returns the Ways and Means Committee of the House of Representatives in its report on the 1932 Revenue Act (72nd Congress, First Session, House Report 708 at page 53) stated:

> "The Bill does away with this uncertainty by placing all joint ventures, sydicates, pools and similar organizations which do not constitute associations or trusts, in the category of partnerships, and the members of such syndicates, pools, etc., in the category of partners. This provision will have the effect of requiring the syndicate to file an information return similar to the return

> of a partnership and will thus make it easier for the members to determine the distributive shares in the syndicate gains and losses which are to be included in their own returns."

It is obvious, therefore, that the purpose of this change in the definition of partnership (first enacted in the 1932 Revenue Act and continued from that time into the Internal Revenue Code) was to treat as partnerships business organizations which in fact were not partnerships under general law.

If, as the Circuit Court of Appeals said, much confusing language has been used in deciding cases on this subject, the confusion depends largely on failure to recognize the fact that a syndicate, group, pool, joint venture, or other incorporated organization may be a code partnership though it does not conform to the definition of a common law partnership. And in the Bloomfield case, if we eliminate the Court's stress on the significance of "intentional joint action and combination of effort in the undertaking" the case falls precisely with respect to facts and law into the category of such code partnerships as are described in

> *Gerstle v. Commissioner,* 95 Fed. (2d) 587;
>
> *Commissioner v. Rector & Davidson* (C.C.A. 5, 1940), 111 F. (2d) 332;
>
> *C. A. Everts, et al., v. Commissioner* (1938), 38 B.T.A. 1039;
>
> *C. H. Clovis* (1935), 32 B.T.A. 646;
>
> *Stantex Petroleum Co., Trustee* (1938), 38 B.T.A. 269.

While in *Lewis v. Commissioner* (1937), 301 U. S. 385, 81 L. Ed. 1174, there was only one owner, the principle and language of the opinion are applicable here.

The circumstances that in some of those cases the investors signed an agreement with one another as well as with the common agent whereas the Bloomfield investors severally signed an agreement only with the agent is an element of strength (not, as the Court's opinion suggests, of weakness) in our contention that the Bloomfield investors were not a code association or corporation because here there was no joint agreement but only appointment of a common agent and nothing analogous to a corporate board of directors directing the agent.

If we parallel certain similarities of and differences between the *Gerstle* case and the Bloomfield case, it will be seen that the Gerstle Syndicates more closely resembled a corporation than do the Bloomfield investors.

1. In the *Gerstle* case members of one syndicate contributed to a pool using the aggregate amount to purchase certain properties which they believed could be quickly resold at a profit. Management of the properties was intended to be such only as would be necessarily incident to the ownership during the interim between purchase and sale.

In the Bloomfield case there was no concerted action of the investors, but the purpose and intention were the same as those of the syndicate members in the *Gerstle* case.

2. In the *Gerstle* case the one agreement was signed by all the parties, thus making the transaction more like an association than in the Bloomfield case. (R. 53.)

3. The Gerstle agreement gave the syndicate managers complete discretion in the selection of the properties to be purchased, the amount of purchase price, details of management, terms of sale and all other matters related to syndicate operations.

In the Bloomfield case *specifically designated* property was to be bought, and sold, only a single venture was contemplated, and Clayton (with narrower powers than those given the Gerstle managers) was appointed agent for that purpose by each investor individually and separately.

4. In the *Gerstle* case it was provided that the title to properties purchased might be taken in any name or names the syndicate managers determined and title was held by two title companies.

In the Bloomfield case it was specifically provided that title be taken originally in the name of M. E. Thomas.

5. In the *Gerstle* case the Board (33 B.T.A. 830 at 834) said that after the several ventures were launched, it appeared that the peak of real estate values had been reached, the market declined and the expected prompt profitable resale of the properties became impossible. This situation forced the Gerstle syndicates managers to undertake certain activities not contemplated by the original plan, such as the demolishing of buildings.

So also in the Bloomfield case, the depression in real estate values stopped immediate sale and required the continued operation of the properties. (R. 140, 209.) However, the operations of the Gerstle managers went further than those of Clayton in the Bloomfield case. The mere fact that there were more properties in the Bloomfield case and consequently more time was required to sell them, makes no difference in principle.

6. In the *Gerstle* case the syndicates as such had no name, no office, except as that of the fiscal agent could be so considered, no officers except as the managers could be so considered, no stationery, no by-laws, no books of record except accounts kept by the fiscal agent. (33 B.T.A. 830 at 835.)

The Bloomfield investors as such had no common name, no office and no officers; certainly Clayton as the agent for the individual investors could not be so considered; they had no stationery, no by-laws and no books of record. The account kept by Clayton was the same form of account that Clayton keeps in any case where it is acting as agent. (R. 74, 75, 76, 77, 80.)

7. In the *Gerstle* case, there was no capital stock nor certificates of beneficial interest and the agreements provided the sole evidence of the interest of the several members and except for the agreement (executed by all members) there was no formal organization.

In the Bloomfield case there was no capital stock nor were there certificates of beneficial interest. The

agreements executed separately and individually by each investor and Clayton did not provide even for the informal organization inferentially found in the *Gerstle* case. Thus the Gerstle syndicates more closely resembled corporations.

8. The members of the Gerstle syndicates informally met and discussed syndicate affairs and policies. (33 B.T.A. 830 at 835 and 836.)

In the Bloomfield case the investors never met except in two or three instances when some of them met to discuss tax matters. (R. 76.)

9. In the *Gerstle* case it was said (33 B.T.A. 830) that the only persons who might be said to stand in the position of officers or directors were the managers, and they did not act as such.

The Bloomfield case is even less like a corporation; there were no officers or directors.

10. In the *Gerstle* case neither the managers nor any member held legal title to any of the syndicate real estate; title was held by two title companies.

In the Bloomfield case the legal title was held by Thomas.

11. In the *Gerstle* case the syndicates were not organized with the idea of remaining in existence any substantial length of time nor of actively operating any business. Nor was it intended to improve the properties. Management was to be only such as was necessary and incident to ownership during the interim between purchase and sale. (33 B.T.A. 830, p. 840.)

The same is true in the Bloomfield case. It is true that it involved much more property, which, as pointed out in the opinion of the Tax Court, required a longer time to sell. The principal delay, however, was caused by the depression, with the result that during a period of ten years, from 1930 to 1940, there were virtually no sales, and during that time, of course, the unsold properties required care, including renting or farming. At no time was the original purpose of the profitable resale of the properties changed. (R. 87.)

We submit that the tests mentioned in the *Morrissey* case, and applied by the Circuit Court of Appeals in the *Gerstle* case, with the conclusion that the parties in that case were acting as partners, should have led to the same conclusion in the Bloomfield case. In short, the Commissioner was right for the first fourteen years, and erred when he changed his mind. At points where the cases differ, the Bloomfield case is more like a partnership and less like a corporation. In the *Gerstle* case, there was a provision for assignments of interest by written notice. There was no such provision in the Bloomfield agreement. A few transfers were made. All property interests are subject to transfer in one way or another. Title must lodge somewhere. But the test is not transferability, but *easy transferability like that of corporate shares.* Only in such circumstances does transferability become significant.

While we are aware that the Court here is not concerned with the merits of this particular case except

to the extent that they call for exercise of the Court's discretion to take jurisdiction under Rule 38, or otherwise, we invoke that jurisdiction not only on the grounds stated but on the ground that there is urgent need for some definitive decision by this Court which will enable an honest investor and willing taxpayer to determine with some certitude whether a venture on which he wishes to embark will be taxable as a partnership or as a corporation. That question may well determine whether he goes into the venture or stays out. Syndicates, such as the Bloomfield one, are a familiar device for handling real estate transactions of this kind. But what is an investor to do if he patterns his venture on one that has been held to be taxable as a partnership and too late discovers that *his* venture is to be taxed as a corporation because the Commissioner has had a belated change of mind?

II. THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY IN CONFLICT WITH APPLICABLE STATE DECISIONS.

Without specifying what sort of title Thomas held, the Circuit Court of Appeals decided that it was not a naked resulting trust and that the investors held no undivided interests in the realty but their interests were only personal claims against the Operator and were limited to the right to receive distribution of the net profits to be derived from the operation.

The terms of the agreement (see appendix) were that the title was to be taken originally in the name

of Thomas "in trust" for the fourteen investors, "for the profitable resale" of the land. The Operator had the right to have the title conveyed from time to time to others, but no title was conveyed to Clayton & Co., and consequently Clayton & Co. was not a trustee under California law.

> *Bainbridge v. Stoner,* 16 Cal. (2d) 423 at 428, 106 Pac. (2d) 423 at 427.

Thomas had no control over the disposition of the property. Thomas made no contribution to the purchase price. Thus there was a transfer of real property made to one person, and the consideration therefor paid by others, in which case a trust is presumed to result in favor of the persons by whom such payment is made.

Section 853, *Civil Code of California,* quoted in the petition for *certiorari,* says so, and that is the holding in *Estate of Harris,* 9 Cal. (2d) 649 at page 660, 72 Pac. (2d) 873 at page 879, first column, quoted in our petition for *certiorari.*

See also:

> *Harris v. Cassells,* 202 Cal. 648, 262 Pac. 319;
> *Riley v. Martinelli,* 97 Cal. 575, 32 Pac. 579;
> *Case v. Codding,* 38 Cal. 191;
> *Currey v. Allen,* 34 Cal. 254.

The statement that the Bloomfield investors had only personal claims against the Operator limited to the right to receive distributions of the *"net profits"* to be derived from the operation, overlooks the facts that the investors were also entitled to receive their

capital back, that each owned an equitable interest in the lands (otherwise where did the equitable title rest?), and that if the Operator failed to comply with its obligations any investor might terminate the agency, set aside the resulting trust in Thomas, and sue to partition the lands. In short, each investor had the rights of ownership subject to the agency contract.

Federal courts are bound by rules of property as established by state statutes and decisions of state courts.

Green v. Lessee of Neal, 6 Pet. 291, 8 L. Ed. 402.

Snydam v. Williamson, 24 How. 427, 16 L. Ed. 742, Headnote: "State laws govern as to title and transfer of real property—this court will follow state rule of property, even if contrary to its own opinion."

Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458, 69 L. Ed. 1050;

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

III. THE COMMISSIONER MAY NOT HOLD THESE INVESTORS AS A CODE ASSOCIATION TAXABLE AS A CORPORATION AND CHARGE INTEREST OR IMPOSE PENALTIES AFTER HAVING ACCEPTED THEIR RETURNS AS A PARTNERSHIP AND THEIR TAXES AS PARTNERS FOR FOURTEEN YEARS, WITH FULL KNOWLEDGE OF THE FACTS, AND THUS ESTABLISHED ADMINISTRATIVE CONSTRUCTION OF THE TRANSACTION.

Since the Commissioner by his agents accepted partnership returns for a period of fourteen taxable

years with full knowledge of the facts and the investors in reliance upon this continued to file such returns it seems to be inequitable that they should be now subjected to payment of large amounts of interest and the possibility of penalty merely because the Commissioner has changed his theory as to the manner of taxing the Bloomfield Syndicate. This is a case of long-continued application of the statute to the facts of a particular transaction; of established administrative construction of that transaction. It is not a case of income escaping taxation, for the full amount thereof has been taxed in the hands of the investors as earned. Now they are faced with additional taxation, and assessments not representing taxes at all (the interest and penalty), which would not have been incurred but for the Commissioner's change of mind.

We are aware of such cases as *United States v. Stewart*, 311 U. S. 60, 85 L. Ed. 40 (relating to representations in bond-selling circulars by unauthorized agents of the government) but the question whether the administrative construction or other acts or long-continued inaction on the part of authorized agents and officials of the Bureau of Internal Revenue in a particular transaction can in a proper case raise an estoppel against the government in tax matters has not been decided by this Court. While there are cases in inferior Courts to the effect that in general an estoppel cannot be raised against the Commissioner, this is a matter of such importance that it should be finally ruled upon by this Court.

This case, it seems to us, should come within the doctrine of *Ritter v. United States* (C.C.A. 3), 28 Fed. (2d) 265, at 267, where the Court said:

> "The acts or omissions of the officers of the Government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the Government, if the officers have acted within the scope of their authority."

In that case a field agent who had advised a taxpayer that he need not file a claim for a refund to which he was entitled was held to have acted without authority. But in the Bloomfield case the collector with whom the returns were filed and the agents who made the examinations certainly acted within the scope of their authority in accepting for fourteen years, and with full knowledge, the partnership returns as proper returns for the syndicate and in accepting without objection the taxes of the investors as those of partners in the venture. In the *Ritter* case the Court said (pp. 267-268) that the Commissioner of Internal Revenue must have agents to assist him and that the office of a collector is a part of the machinery of the Commissioner for the administration of the revenue.

See also:

> *Walker v. United States*, 139 Fed. 409 at 412-413. (Affirmed C.C.A. 5, 148 Fed. 1022.)

This was a suit by a former United States Marshal named Walker to recover certain disallowed amounts of fees, mileage, and expenses. The government filed a counterclaim. The Circuit Court described the situation thus (p. 411):

"In the discharge of his legal and moral duty, Walker prepared and rendered his accounts, including therein these particular fees, during each year of his incumbency of the office. He made no concealment or misstatement, and there was no fraud. Every one acted honestly and in good faith, relying on a long, and during the time these payments were made an unbroken, practice of the government to allow and pay for these particular services. The court to which the accounts were presented approved them, and the proper officials of the Treasury Department allowed them, and Walker collected the money from the government, and paid three-fourths of the amount of these fees to his deputies from time to time as he made settlements, and retained the balance, as was his duty to do, under the law as then construed by every department of the government which had acted or spoken on the subject. The government knew, when the money was paid to Walker, that the greater part of it would be immediately paid out to others, who in fact, whatever may be the legal theory, had rendered services to the government, to pay for which this very money was paid to him. The government repeatedly and uniformly paid these fees in a consecutive course of dealings with him for four years, and then, after a delay of five years after Walker's retirement from office, for the first time makes known its intention to correct what was at least a common error by ripping up all these settlements and compelling him to refund the money. It knew full well that every day's delay in making known to Walker its changed attitude would add to his difficulty in saving himself harmless, if, indeed, it was ever

in his power after paying over the money to his deputies."

The Court further said (p. 412):

"After much deliberation, the court has reached the conclusion, whatever may be the general rule, that under the facts of this case the United States stands, as to its counterclaim, upon no better footing than would the private citizen, though doubtless it may recover money paid under mistake of law by its officers. It is conceded that the money the government now seeks to recover by its counterclaim was illegally paid out, that the United States cannot be defeated or barred of its rights by the mere laches of its agents, that it cannot be estopped by the unauthorized acts of its accounting officers, that it is not subject to the statute of limitations, and that the unauthorized acts of his agents never bind the sovereign. It is, however, equally true, when the sovereign becomes an actor in a court of justice, especially in an action which proceeds on equitable principles, that his rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and that the sovereign will be bound, as an individual would be, by his own acts, or by (what is the same thing) acts of his agents lawfully done within the purview of the authority he commits to them."

And further (pp. 417-418):

"Here, owing to the statute of limitations, the government has avoided just claims of Walker which exceed the demand involved in the counterclaim. To allow the government under such cir-

cumstances to kill his claims with the bar of the statute, and then to take advantage of its sovereign character to recover money from Walker, who received and paid out the money in good faith, and who cannot protect himself by the statute of limitations, would be manifestly most unjust."

This case has been cited frequently.

The taxpayers in the Bloomfield case are in the same situation as the Marshal in the *Walker* case. They have been placed at a disadvantage by long administrative construction of the nature of their transaction by authorized agents of the Commissioner.

We respectfully submit that the time has come to reject or at least qualify the precept of such cases as *Schafer v. Helvering*, 83 Fed. (2d) 317-320, where the Court said that:

> "Wrongs between man and man, which shock the conscience and justify the intervention of a court of equity, cannot affect or prejudice the sovereign in the right to demand the full measure of the statute. Whoever deals with the Government does so with notice that no agent can, by neglect or acquiescence, commit it to an erroneous interpretation of the law."

Application of that doctrine in all its rigor, now that the citizen has so many contacts with government officers in so many fields, would work great and frequent injustice.

This Court has shown independence in reexamining matters of great importance and has not

hesitated to overrule a long series of lower Court decisions or its own outmoded rulings when an examination of the merits of the matter warranted. (*United States v. Darby,* 312 U. S. 100, 85 L. Ed. 609; *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.) We think that this question alone is sufficient to justify the granting of certiorari in this case.

We respectfully submit that the writ should be granted on each of the points argued in this brief.

Dated, San Francisco,
June 24, 1948.

O. K. CUSHING,
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Attorneys for Petitioners.

(Appendix Follows.)

STATUTES AND REGULATIONS INVOLVED.

"Sec. 3797 [Internal Revenue Code]. (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * * * *

"(2) Partnership and Partner.—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization.

"(3) Corporation.—The term 'corporation' includes associations, joint-stock companies, and insurance companies."

* * * * * * *

"(b) Includes and including.—The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined."

"Regulation Sec. 19.3797-1. *Classification of taxables.*—For the purpose of taxation the Internal Revenue Code makes its own classification and prescribes its own standards of classification. Local law is of no importance in this connection. Thus a trust

may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities. (See [Reg.] section 19.3797-3.) The term 'partnership' is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called partnerships. (See [Reg.] section 19.3797-4.) The term 'corporation' is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships. (See [Reg.] sections 19.3797-2 and 19.3797-4.) The definitions, terms, and classifications, as set forth in [Code] section 3797, shall have the same respective meaning and scope in these regulations."

"Regulation Sec. 19.3797-2. *Association.*—The term 'association' is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a 'business' trust, a 'Massachusetts' trust, a 'common law' trust, an

'investment' trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Code, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association."

"Regulation Sec. 19.3797-3. *Association distinguished from trust.*—The term 'trust,' as used in the Internal Revenue Code, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

"As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed

(whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages. The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.

"If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Internal Revenue Code as a corporation. However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

"By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of

both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as a 'quasi-corporate form.' The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other 'officer,' the use of a 'seal,' the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a 'charter' or 'by-laws,' the existence of 'control' by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form itself. The Internal Revenue Code disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely,

as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

"The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed."

"Regulation Sec. 19.3797-4. *Partnership.* — The Internal Revenue Code provides its own concept of a partnership. Under the term 'partnership' it includes not only a partnership as known at common law but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. On the other hand the Code classifies under the term 'corporation' an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such

an organization is an association, taxable as a corporation. As to the characteristics of an association, see also [Reg.] sections 19.3797-2 and 19.3797-3. The following examples will illustrate some phases of these distinctions:

"(1) If A and B buy some acreage for the purpose of subdivision, they are joint adventurers, and the joint venture is classified by the Internal Revenue Code as a partnership.

"(2) A, B, and C contribute $10,000 each for the purpose of buying and selling real estate. If A, B, C, or D, an outside party (or any combination of them as long as the approval of each participant is not required for syndicate action), takes control of the money, property and business of the enterprise, and the syndicate is not terminated on the death of any of the participants, the syndicate is classified as an association."

THE FORM OF CONTRACT SIGNED SEPARATELY BY EACH OF THE BLOOMFIELD INVESTORS. (Emphasis ours.) (Tr. 157.)

$50,000.00 San Jose, Cal. March 10, 1926

This is to acknowledge receipt by the undersigned, James A. Clayton & Co., a corporation of San Jose, Cal., hereinafter called the "Operator", from J. P. Dorrance of San Jose, hereinafter called the "Investor", of the sum of Fifty Thousand ($50,000.00) Dollars, which sum is so received by, and paid to, said corporation on the terms and conditions and for the purposes, as hereinafter set forth and not otherwise, to-wit:

The Operator is to use said sum, together with other sums contributed by thirteen other persons, who are also referred to herein as "Investors" and other sums borrowed or advanced by said operator—the unpaid portions thereof, may be reborrowed or renewed, and security given—in the purchase of certain lands and interests, in the Counties of Santa Clara, San Benito and Santa Cruz, California, belonging to Miller & Lux, Inc., and consisting of approximately 27,000 acres of land, together with divers rights, appurtenances and easements as described in three deeds to M. E. Thomas dated March 3rd, 1926 and recorded March 10th, 1926 in Santa Clara, San Benito and Santa Cruz Counties, Cal.

The Operator is to take and hold title to said properties originally in the name of M. E. Thomas; but may take such title in the name of any other person, corporation or concern, or in its own name; and may have such title conveyed, from time to time, to other persons, corporations or concerns, or otherwise conveyed or held, as the Operator may desire, *in trust* for the said 14 investors above referred to, for the profitable resale thereof.

The Operator may sell, convey, hold, lease for *one season only,* or in any otherwise deal with and treat said properties as the sole and absolute owner thereof in fee simple, and without let or hindrance from the Investor, or any of the Investors, less than the full number thereof, or any other person or concern, whatsoever. But may not exchange, encumber, nor lease *except* as above specified, ***nor sell trees, wood or im-***

provements off from said property without the consent of the investors.

The Operator may, from time to time, incur such costs, expenses, and charges in connection with the acquiring, holding, renting, selling or protecting of said properties, as it may deem proper; and the fact of the Operator incurring such cost, expense or charge, shall conclusively establish the propriety and legality thereof.

The Operator shall keep true and accurate books of account, in which shall be set down, from time to time, all moneys paid out and charges, expenses and costs incurred in the premises, and all sales made and properties disposed of, and moneys or other things of value received by it in the premises.

Out of the moneys received from sales or renting or other sources of said properties, the Operator shall first retain for its own use and benefit, a commission of five percentum (5%) on the gross selling price of each parcel sold, as sales are made, and from the net proceeds of such sales, after deduction of its commissions, the Operator shall pay all costs, expenses, and charges paid or incurred by it in the premises, and all moneys advanced or borrowed by it, together with interest thereon.

From any residue of moneys remaining in the Operator's hands, after all the foregoing payments have been made, the Investor *shall be entitled* to have returned to him, at the same time, and in equal amounts, as are returned to the other Investors, the

whole or such part of the said sum herein receipted for, as may, in the judgment of the Operator, be safely paid, without jeopardy to any remaining properties or assets, not yet converted into cash; but no Investor shall be entitled, as of right, to any payment or return, or repayment before said properties and the proceeds thereof, have been converted into cash, and all such commissions, debts, advances, costs, charges and expenses have been fully paid, provided, however, that upon the payment of the debts, taxes and charges accrued, such funds *shall be* distributed equally to said Investors whenever there shall be a net amount of $7000 or more on hand.

When, as, and if all of said properties, and all properties, and all proceeds therefrom shall have been sold and converted into cash, and all such commissions, debts, advances, costs, charges and expenses shall have been fully paid, and all moneys advanced by the Investors shall have been fully repaid, all moneys, if any, then remaining in the hands of the Operator arising out of said transactions, and not applicable to any of the foregoing requirements, shall be, by said Operator, paid to and divided among the Investors, in equal shares to each of them, their heirs and assigns.

It is authorized, understood and agreed, however, that the Operator has charged, and is entitled to a commission of Fifty Thousand ($50,000.00) Dollars for the negotiation, purchase and consummation of sale of said properties from Miller & Lux, Inc., to said M. E. Thomas, which is in addition to commissions

to be credited to it for subsequent resales, and which shall be added to, and included in charges and expenses of the transactions herein provided for, and accounted as part of the original purchase price of said properties.

The Investor shall be entitled to have an account rendered to him by the Operator, of all transactions hereunder, on demand, but not more often than once each sixty days.

These presents are executed in duplicate by the Operator and the Investor, the day and year set out at the opening hereof, and shall be binding upon the successors, heirs, representatives and assigns of each of them.

James A. Clayton & Co.,
By Frazier O. Reed,

Its President,

W. S. Clayton,

Its Secretary,
Operator

J. P. Dorrance,

Investor

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 137

BLOOMFIELD RANCH, by JAMES A. CLAYTON & CO., a corporation, managing partner, operator and co-owner thereof, and by FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRENCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, Estate of Andrew R. Patrick, deceased, by SIGURD C. P. CORNETT, as executor of the will of Andrew R. Patrick, deceased, SAN JOSE HARDWARE CO., a corporation, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, and estate of Ellen Weinstein, deceased, by Wells Fargo Bank & Union Trust Co., Executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 212-227) is not reported. The opinion of the Circuit Court of Appeals (R. 260-277) is reported at 167 F. 2d 586.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 20, 1948. (R. 277-278.) The petition for rehearing was denied May 24, 1948. (R. 278.) The petition for a writ of certiorari was filed July 6, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in affirming the Tax Court's decision that Bloomfield Ranch is an "association" taxable as a corporation under Section 3797(a)(3) of the Internal Revenue Code and the applicable Treasury Regulations.

STATUTE AND REGULATIONS INVOLVED

These appear in the Appendix, *infra*, pp. 15-22.

STATEMENT

The facts as stipulated (R. 202-211) and found by the Tax Court (R. 212-219) may be summarized as follows:

In 1926 James A. Clayton & Company (hereafter called "Clayton Company"), a real estate agent,

induced 13 of its customers to join with it in the purchase of 21 separate parcels of California land from its then owner, Miller & Lux, Inc. The parcels were widely scattered in 3 counties, and contained about 27,500 acres suitable for various agricultural purposes and 42 acres of city property. Clayton Company and the 13 individuals who joined with it each invested $50,000 and formed a syndicate known as Bloomfield Ranch, hereafter referred to as "taxpayer".[1] The agreement of the parties was represented by 14 separate but identical written instruments signed by Clayton Company as "Operator" and by each participant as "Investor". (R. 212-214.) The agreement is reproduced in full at R. 167-170, and is summarized in the Tax Court's findings at R. 214-216. Briefly, it provided as follows:

The Operator was to use the fund contributed by the Investors to purchase the properties, and could take title in the name of any person or corporation. It was empowered, among other things, to borrow additional funds to help finance the purchase; to "sell, convey, hold, lease for one season only, or in any otherwise deal with" the properties as absolute owner; and to "incur such costs, expenses, and charges in connection with the acquir-

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[1] While Bloomfield Ranch is referred to as "taxpayer", the petitioners are its 19 outstanding members. It filed a partnership return for the taxable year (R. 190), in which the members were described as partners (R. 194).

ing, holding, renting, selling or protecting" the properties it deemed proper. The Operator was to receive a commission of $50,000 for negotiating the purchase, and a 5% commission on resales. Distributions were to be made to the Investors whenever the Operator had a net amount of $7,000 or more on hand. When and as all the properties were sold and all expenses paid, the net proceeds were to be divided among the Investors or their heirs and assigns. Each Investor was entitled to an accounting upon demand, but not more often than once every sixty days. The agreement was binding upon the "successors, heirs, representatives and assigns" of the parties.

In March of 1926 Clayton Company paid Miller & Lux, Inc., $1,235,000 for the properties. It borrowed $585,000 which, with the $700,000 contributed by the Investors, covered the purchase price plus its commission of $50,000. Titles were taken in the name of one Thomas, an employee. (R. 216.) The properties were purchased subject to outstanding leases which had been made by Miller & Lux, Inc., and the rentals from these leases amounted to $34,041 in 1926. (R. 216.) Miller & Lux had installed 9 wells and pumping units on the properties, and Clayton Company installed some new ones and repaired the old ones at a total cost of $37,903. (R. 218-219.)

From 1926 through the taxable year (1940) the operations of Clayton Company consisted of farm-

ing, renting, and selling the properties; collecting rents under leases, and payments of principal and interest on installment sales; paying taxes; disposing of farm products; and in general attending to financial and accounting aspects of the venture. (R. 218). By the end of 1927 Clayton Company had repaid the $585,000 borrowed as part of the purchase price of the properties, and by the end of 1930 about 90% of the properties had been sold. After 1930 sales dropped sharply due to the depression, and only 60 acres were sold in the next 10 years. There was never any intention to sub-divide the 42 acres of city property into lots, and Clayton Company refused to sell this acreage in units of less than one city block. (R. 216-217.) During the fifteen-year period from 1926 through 1940 interest received totalled $156,402.85, profits from sales totalled $311,766.93, gross rentals totalled $456,062.91, and miscellaneous receipts totalled $19,533.97. Total gain over the cost of the properties amounted to $541,843.06. (R. 218.) Income from farming and rent was accounted for separately on tax returns; with the exception of 3 years the farming operations were conducted at a loss. (R. 217-218.)

Distributions totaling $98,250 have been made on each of the 14 investment units, or a total of $1,375,500. This represents a return of the original $700,000 capital invested in the enterprise plus profits from all operations. (R. 218.)

Changes have occurred in ownership of the Investors' interests due to deaths, transfers and sales of all or a part of the original 14 Investor units. There are now 19 Investors holding the original 14 interests, some holding less and others holding more than a 1/14 interest. Whenever any change in Investor interests occurred Clayton Company was notified and made formal acknowledgment and record of the change. The original agreement of each Investor had attached to its endorsement of any transfer. (R. 219.)

Taxpayer reported its income for the taxable year as a partnership. (R. 190, 212.) The Commissioner determined that the enterprise was an "association" taxable as a corporation under Section 3797 (a) (3) of the Internal Revenue Code, resulting in the deficiencies in controversy. (R. 21-22.) The Tax Court sustained his determination (R. 219, 227-228), the Circuit Court of Appeals affirmed (R. 260-278), and taxpayer's petition for rehearing was denied (R. 278).

ARGUMENT

This case is controlled by *Morrissey* v. *Commissioner*, 296 U. S. 344, and the companion cases of *Swanson* v. *Commissioner,* 296 U. S. 362; *Helvering* v. *Combs,* 296 U. S. 365; and *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369. There is no conflict, and no occasion for further review.

1. The Internal Revenue Code makes its own classification of business organizations for federal income tax purposes. Section 3797 (a) (2) (Appendix, *infra*) defines a "partnership" as including any joint business venture "which is not, within the meaning of this title, a trust or estate or a corporation". Section 3797 (a) (3) in turn defines a "corporation" as including "associations". The principles determinative of whether a joint business venture is an "association", and hence taxable as a corporation, were settled by this Court in the *Morrissey* and companion cases, *supra*, and are embodied in the long-standing applicable Treasury Regulations. Sections 19.3797-1 to 19.3797-5 of Treasury Regulations 103 (Appendix, *infra*). "The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity". *Morrissey* v. *Commissioner, supra*, p. 357. Whether the organization is sufficiently analogous to a corporation to justify its tax treatment as such depends on whether it has the salient features of a conventional corporation: centralized management, continuity of existence uninterrupted by the death of a participant or change in ownership of a participating interest, transferability of the participating interests, limited liability of the participants, and continuity of title to the property embarked in the enterprise.

Applying the criteria laid down in the *Morrissey* and companion cases the Tax Court concluded that,

with the possible exception of the limited liability feature,[2] taxpayer possessed all the important attributes of a corporation. (R. 220, 225-227.) And the record unquestionably warrants that conclusion. Taxpayer was organized by identical instruments of agreement between an "Operator" and 14 "Investors" who invested cash in a joint business undertaking and received participating interests in the enterprise. (R. 167-170, 213-214, 222-223.) Management of the business was centralized in the Operator (R. 167-168, 217-218); the organization was not interrupted by the death of any Investor or by a change of Investor interests (R. 170); the interests of the Investors were transferable, and have been transferred in whole or in part (R. 171-186, 219); and continuity of title was assured by provisions authorizing the Operator to take title in the name of any person or corporation (R. 167-168, 224). Through the Operator taxpayer engaged for 15 years (including the taxable year)

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[2] As the Tax Court observed (R. 226-227), it is not clear whether liability to third parties was limited, although it would seem so. In any event, absence of limited liability is not decisive if the organization is otherwise analogous to a corporation. Section 19.3797-4 of Regulations 103; *Burk-Waggoner Assn.* v. *Hopkins*, 269 U. S. 110; *Helm & Smith Syndicate* v. *Commissioner*, 136 F. 2d 440, 441 (C. C. A. 9th); *Bert* v. *Helvering*, 92 F. 2d 491, 495 (App. D. C.); *Del Mar Addition* v. *Commissioner*, 113 F. 2d 410, 411 (C. C. A. 5th); *Pennsylvania Co. for Insurances, Etc.* v. *United States*, 138 F. 2d 869, 874 (C. C. A. 3d), certiorari denied, 321 U. S. 788; *Fletcher* v. *Clark*, 150 F. 2d 239 (C. C. A. 10th), certiorari denied, 326 U. S. 763.

in extensive farming, renting, selling and other business activities (R. 217-218), from which the Investors realized almost 100% profit on their investment (R. 218). In the light of these uncontroverted facts affirmance of the Tax Court's decision by the court below was clearly correct. Here, as in *Helvering* v. *Combs, supra,* p. 368, "The parties joined in a common enterprise for the transaction of business, and the beneficiaries [here the Investors] who contributed money for that purpose became associated in the enterprise according to the terms of the arrangement". See also *Morrissey* v. *Commissioner, supra,* p. 357.

2. In affirming the Tax Court's decision the court below did not, as taxpayer asserts (Pet. 2-3, 12; Br. 21, 22-26), adopt a test different from that prescribed in the *Morrissey* and companion cases. It could hardly have done so, for the Tax Court's decision is rooted in those cases. (R. 220.) Far from repudiating the principles of the *Morrissey* case, the court below expressly held that "We are in accord with the Tax Court that in organization and manner of operation this enterprise is an association within the ambit of the principles laid down in the *Morrissey* case". (R. 275.) It properly addressed itself, as did the Tax Court, to the basic question presented—whether taxpayer sufficiently resembled a corporation to justify taxation of its income as such; and it proceeded to point out, as had the Tax Court, that taxpayer possessed the es-

sential characteristics of a corporation. (R. 275-277.) In an effort to find conflict with the *Morrissey* case taxpayer seizes (Br. 22-23) upon a superfluous portion of the opinion below, isolated from its context, and ignores the plain tenor of the opinion as a whole.[3] That in sustaining the Tax Court the court below may have strayed from the issue cannot affect the result, and furnishes no occasion for further review.

Commissioner v. *Gerstle,* 95 F. 2d 587 (C. C. A. 9th), upon which taxpayer chiefly relies for conflict (Br. 26-31), was decided by the very court which decided this case and is distinguishable for the reasons noted by it in the opinion below (R. 273-275), and also in *Helm & Smith Syndicate* v. *Commissioner,* 136 F. 2d 440, 441 (C. C. A. 9th), and *United States* v. *Homecrest Tract,* 160 F. 2d 150, 153, fn. 7 (C. C. A. 9th). It is doubtful whether, in view of these later decisions by the same court (including its decision here), the

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[3] The portion of the opinion below relied upon by taxpayer was directed to its irrelevant contention that there was no "joint activity" by the Investors. (R. 269-270.) It is the "*entering* into a joint enterprise" having the salient features of a corporation (*Morrissey* v. *Commissioner, supra,* p. 356 (italics ours)), not the joint *activity* of the members, which warrants treatment of it as an "association" taxable as a corporation. "Undoubtedly the terms of an association may make the taking or acquiring of shares or interests sufficient to constitute participation, and may leave the management, or even control of the enterprise, to designated persons". *Morrissey* v. *Commissioner, supra,* p. 357.

Gerstle case still has any vitality. In *Commissioner* v. *Rector & Davidson,* 111 F. 2d 332 (C. C. A. 5th), certiorari denied, 311 U. S. 672, upon which taxpayer also relies for conflict (Br. 26), the "continuity" feature was lacking (p. 333), and the Circuit Court of Appeals affirmed the Tax Court's decision that the enterprise was more akin to a partnership than to a corporation. No useful purpose can be served by an analysis of the legion of cases in this field since each turns, as it must, on its own facts. If any comparison with other cases is to be drawn, we submit that the one at hand bears less similarity to the few upon which taxpayer relies than to the many in which the organization involved was held to be an "association".[4]

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[4] See, *e.g.*, *Wabash Oil & Gas Ass'n* v. *Commissioner*, 160 F. 2d 658 (C. C. A. 1st), certiorari denied, 331 U. S. 843; *Wellston Hills Syndicate Fund* v. *Commissioner*, 101 F. 2d 924 (C. C. A. 8th); *Kilgallon* v. *Commissioner*, 96 F. 2d 337 (C. C. A. 7th), certiorari denied, 305 U. S. 622; *United States* v. *Rayburn*, 91 F. 2d 162 (C. C. A. 8th); *Bert* v. *Helvering*, *supra; Bordages Estate Trust* v. *Commissioner*, 159 F. 2d 62 (C. C. A. 5th); *Fletcher* v. *Clark*, *supra; Poplar Bluff Printing Co.* v. *Commissioner*, 149 F. 2d 1016 (C. C. A. 8th); *Sherman* v. *Commissioner*, 146 F. 2d 219 (C. C. A. 6th); *National Metropolitan Bank* v. *Commissioner*, 145 F. 2d 649 (C. C. A. 4th); *Adkins Properties* v. *Commissioner*, 143 F. 2d 380 (C. C. A. 5th); *Commissioner* v. *City Nat. Bank & T. Co.*, 142 F. 2d 771 (C. C. A. 10th), certiorari denied, 323 U. S. 764; *United States* v. *Hill*, 142 F. 2d 622 (C. C. A. 10th); *Pennsylvania Co. for Insurances, Etc.* v. *United States*, *supra; Sibley Syndicate* v. *Commissioner*, 131 F. 2d 224 (C. C. A. 6th), certiorari denied, 318 U. S. 786; *Keating-*

3. Nothing in the statute, the Regulations, the controlling decisions, or elsewhere, warrants taxpayer's assumption (Pet. 4, 12; Br. 32-34) that local law governs the classification of business organizations for tax purposes. This Court has held directly to the contrary. *Burk-Waggoner Assn.* v. *Hopkins*, 269 U. S. 110; *Morrissey* v. *Commissioner, supra;* see also *United States* v. *Homecrest Tract, supra.* The applicable Treasury Regulations (Sections 19.3797-1 and 19.3797-4 of Regulations 103) specifically provide otherwise, and since the statutory provisions to which they are addressed have been repeatedly reenacted the Treasury's interpretation must be deemed to have received implied Congressional approval. *Morrissey* v. *Commissioner, supra*, p. 355; *Coast Carton Co.* v. *Commissioner*, 149 F. 2d 739 (C. C. A. 9th); *Sher-*

Snyder Trust v. *Commissioner*, 126 F. 2d 860 (C. C. A. 5th); *Commissioner* v. *Nebo Oil Co., Trust*, 126 F. 2d 148 (C. C. A. 10th), certiorari denied, 317 U. S. 636; *Second Carey Trust* v. *Helvering*, 126 F. 2d 526 (App. D. C.), certiorari denied, 317 U. S. 642; *Commissioner* v. *Fortney Oil Co., Etc.*, 125 F. 2d 995 (C. C. A. 6th); *Nashville Trust Co.* v. *Cotros*, 120 F. 2d 157 (C. C. A. 6th), amended, 122 F. 2d 326, certiorari denied, 314 U. S. 680; *Fidelity-Bankers Trust Co.* v. *Helvering*, 113 F. 2d 14 (App. D. C.), certiorari denied, 310 U. S. 649; *Del Mar Addition* v. *Commissioner, supra; Sears* v. *Hassett*, 111 F. 2d 961 (C. C. A. 1st); *Marshall's Heirs* v. *Commissioner*, 111 F. 2d 935 (C. C. A. 3d), certiorari denied, 311 U. S. 658; *Hamilton Depositors Corp.* v. *Nicholas*, 111 F. 2d 385 (C. C. A. 10th); *Ross Lewis Trust* v. *Commissioner*, 110 F. 2d 937 (C .C. A. 10th).

man v. *Commissioner,* 146 F. 2d 219 (C. C. A. 6th).[5]

4. Nor is there any substance in taxpayer's contention (Pet. 4-5, 12; Br. 34-40), advanced for the first time in the petition for certiorari, that the Commissioner is estopped from determining taxpayer's correct tax liability for the taxable year here involved[6] merely because he did not assert any liability for prior taxable years. Taxpayer's enjoyment of tax immunity for years which cannot be reopened obviously does not endow it with permanent immunity. Even if the Commissioner had made a previous determination of taxpayer's tax liability for the very year here involved, he would not have been precluded from reexamining and changing his determination within the statutory period of limitations. *Burnet* v. *Porter,* 283 U. S. 230; *Bonwit Teller & Co.* v. *Commissioner,* 53 F. 2d 381 (C. C. A. 2d), certiorari denied, 284 U. S. 690;

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[5] Taxpayer's contention (Br. 32-33) that under local law the Investors were beneficiaries of a resulting trust is irreconcilable with its partnership return designating them as partners (R. 190, 194), and with its concurrent insistence that it is a partnership. But even granting, *arguendo,* that taxpayer is a trust, its position is in no wise aided; the enterprise would nonetheless fall within the category of business trusts taxable as associations. Section 19.3797-3 of Regulations 103; *Morrissey* v. *Commissioner, supra.*

[6] There is no basis for taxpayer's charge (Pet. 12; Br. 35) that the decision below subjects it to tax "penalties". The only tax liability asserted by the Commissioner was for deficiency in tax (R. 19-22), and that is the only liability imposed by the decision below (R. 227-228).

Schafer v. *Helvering*, 83 F. 2d 317 (App. D. C.), affirmed, 299 U. S. 171. *A fortiori*, he is not foreclosed from making an original deficiency determination for a year still open.

CONCLUSION

The decision below is correct. There is no conflict, and no occasion for further review. The petition should therefore be denied.

Respectfully submitted,

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August, 1948

APPENDIX

Internal Revenue Code:

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) *Corporation.*—The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * *

(26 U. S. C. 3797.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.3797-1. CLASSIFICATION OF TAXABLES.—For the purpose of taxation the Internal Revenue Code makes its own classification and prescribes its own standards of classification. Local law is of no importance in this connection. Thus, a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its na-

ture or its activities. (See section 19.3797-3.) The term "partnership" is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called partnerships. (See section 3797-4.) The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships. (See sections 19.3797-2 and 19.3797-4.) The definitions, terms, and classifications, as set forth in section 3797, shall have the same respective meaning and scope in these regulations.

SEC. 19.3797-2. ASSOCIATION.—The term "association" is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or com-

pany, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Code, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association.

SEC. 19.3797-3. ASSOCIATION DISTINGUISHED FROM TRUST.—The term "trust," as used in the Internal Revenue Code, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph there is an arrangement whereby the legal title to the property

is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages. The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Internal Revenue Code as a corporation. However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient

reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer," the use of a "seal," the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws," the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they

are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Internal Revenue Code disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

SEC. 19.3797-4. PARTNERSHIPS.—The Internal Revenue Code provides its own concept of a partnership. Under the term "partnership" it includes not only a partnership as known at common law but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which car-

ries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. On the other hand the Code classifies under the term "corporation" an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation. As to the characteristics of an association, see also sections 19.3797-2 and 19.3797-3. The following examples will illustrate some phases of these distinctions:

(1) If A and B buy some acreage for the purpose of subdivision, they are joint adventurers, and the joint venture is classified by the Code as a partnership.

(2) A, B, and C contribute $10,000 each for the purpose of buying and selling real estate. If A, B, C, or D, an outside party (or any combination of them as long as the approval of each participant is not required for syndicate action), takes control of the money, property and business of the enterprise, and the syndicate is not terminated on the death of any of the participants, the syndicate is classified as an association.

SEC. 19.3797-5. LIMITED PARTNERSHIPS.—A limited partnership is classified for the purpose of the Internal Revenue Code as an ordinary partnership, or, on the other hand, as an association taxable as a corporation, depending upon its character in certain material respects. If the organization is not interrupted by the death of a general partner or by a change in the ownership of his participating interest, and if the management of its affairs is centralized in one or more persons acting in a representative capacity, it is taxable as a corporation. For want of these essential characteristics, a limited partnership is to be considered as an ordinary partnership notwithstanding other characteristics conferred upon it by local law.

The Uniform Limited Partnership Act has been adopted in several States. A limited partnership organized under the provisions of that Act may be either an association or a partnership depending upon whether or not in the particular case the essential characteristics of an association exist.

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